NO. 45893-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CESAR BELTRAN, JR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Edmund Murphy, Judge
The Honorable Frank Cuthbertson, Judge
The Honorable Bryan E. Chushcoff, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

Page

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

Page

A. ASSIGNMENTS OF ERROR

1. The prosecutor engaged in flagrant, prejudicial misconduct in closing argument that denied the appellant a fair trial as to his obstructing conviction.

2. Ineffective assistance of counsel denied the appellant a fair trial as to the obstructing conviction.

3. Insufficient evidence supports the appellant's obstructing conviction.

4. The trial court violated the constitutional right to a public trial by taking peremptory challenges privately.

Issues Pertaining to Assignments of Error

1. The State charged the appellant with a number of crimes for acts occurring during a very short period of time. The State argued the appellant was guilty of obstructing law enforcement for failing to immediately come to his door when police arrived to investigate a hit and run. However, police officers lacked authority to enter the appellant's home to arrest him for that offense. The State therefore misstated the law in arguing the initial failure to respond to police formed the basis for an obstructing conviction.

Under the circumstances, did the prosecutor commit flagrant, prejudicial misconduct in closing argument, denying the appellant a fair trial as to the obstructing conviction?

2. Where defense counsel failed to object to such argument, did he provide ineffective assistance, denying the appellant a fair trial?

3. Where, in closing argument, the State elected acts that did not, as a matter of law, support an obstructing conviction, should the conviction be reversed for insufficient evidence?

4. During voir dire, the parties made peremptory challenges privately by quietly passing a piece of paper back and forth. Because the trial court did not analyze the Bone-Club[1] factors before conducting this important portion of voir dire privately, did the trial court violate appellant's constitutional right to a public trial?

B. STATEMENT OF THE CASE[2]

1. Charges, verdicts, and sentences

For events occurring during a brief period on July 26, 2013, the State charged Cesar Beltran, Jr. with felony harassment based on threatening a criminal judgment participant (count 1), intimidating a

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[1] State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 629 (1995).

[2] This brief refers to the verbatim reports as follows: 1RP – 10/28/13; 3RP – 1/7 and 1/8/14; 4RP --1/9/14; 5RP –1/13/14; 6RP – 1/14, 1/15, 1/16, and 2/7/2014.

public servant (count 2), third degree assault (count 3), obstructing a law enforcement officer (count 4), resisting arrest (count 5), failing to comply with duty on striking property (count 6), and reckless driving (count 7). CP 1-8.

Jury selection occurred on January 7 and January 8, 2014. CP 107-08. The court handled peremptory challenges by having the attorneys pass a sheet of paper back and forth. CP 103, 107; 3RP 25. In contrast, the court told the attorneys to make challenges for cause in the presence of the jury. 3RP 24-25.

A jury acquitted Beltran of count 3, assault, but convicted him of the remaining charges. CP 12-13, 54-58.

At the sentencing hearing, the court found counts 1 and 2, the remaining felonies, were the same criminal conduct and therefore scored them a single point in calculating the offender score. 6RP 569-70. The court imposed concurrent sentences of 12 months of confinement plus 12 months of community custody on count 2. CP 63-75; 6RP 571.

The court suspended the misdemeanor sentences, which ranged from 90 to 364 days, and ran them concurrently to each other. CP 82-89; 6RP 580-81.

Beltran timely appeals. CP 76.

2. Trial testimony

Alisha Clapp was at her home on East "R" Street near East 44th Street in the Salishan neighborhood of Tacoma when she heard a loud bang. 4RP 92. As she opened her front door, a blue four-door sedan drove by partially in her yard and partially on the sidewalk. 4RP 97, 105-06, 108. A neighbor pressed himself against his front door as the car passed. 4RP 97-98, 102. Clapp estimated the car was traveling at between 25 and 30 miles per hour. 4RP 106. Clapp saw two people in the car but could not see their faces. 4RP 112.

Aszia Keel got off work and was getting into her car near East 44th Street and East Portland Avenue when she heard an engine revving and tires squealing. 4RP 117-18. Keel turned around in time to see a blue Honda round the corner of 44th and "R" streets traveling too fast to make the turn. The car nearly hit a truck and instead struck a stop sign. 4RP 118-22. Police later discovered that the stop sign at the northwest corner of 44th and "R" had been knocked down. 4RP 164-65, 180-81.

After striking the stop sign, the car headed north on "R" Street. 4RP 122-23. Keel got in her car and followed, hoping to get the license plate number. Meanwhile, she called 9-1-1. 4RP 124. Keel briefly lost sight of the car but found it again. 4RP 136-37.

Keel saw the car parking on East 39th Street. Two people got out, approached a house, then walked off in the opposite direction from the car. 4RP 135-36, 138-42. Keel described the occupants and their movements to the 9-1-1 operator. 4RP 142. At first Keel told the operator the driver was Asian or Hispanic, but she later clarified he was Hispanic. 4RP 143. At trial, Keel could not identify Beltran as the driver but thought he looked similar. 4RP 139.

Angela Gentele was patrolling the housing development that day for her employer, a private security company. 4RP 168-69. Gentele saw a blue Honda speed by on East 44th Street. The driver was yelling and hanging out the window. 4RP 176. Gentele saw the driver's face and got the first three letters of the license plate number. 4RP 176-77, 182, 186-87.[3]

Police located a blue 1997 Honda Accord parked on East 39th near a city park. 4RP 205, 222; 5RP 259. The car was registered to Beltran, whose address was listed as 1731 East 38th Street. 4RP 154-55, 213, 219-

[3] Gentele later identified Beltran as the driver at a show-up identification outside Beltran's house. 4RP 183-85, 215.

20. The home was about a block north of the car on the other side of the park.[4] 4RP 213-14.

Police officers soon converged on Beltran's residence to investigate the "hit and run." 4RP 227-28; 5RP 268, 304-05, 342. According to Officer David Anderson, as he pulled up to the home, the front door opened and Beltran stepped out, then went back inside and shut the door. 5RP 269-70. Anderson found this suspicious and called for backup. 5RP 271.

Once additional officers arrived, Anderson and another police officer, Jared Williams, knocked on the front door and announced, "Police." 5RP 272-73, 306. According to Williams, the doorknob turned as if someone was locking the door. 5RP 306.

As Anderson continued to knock, he heard an upstairs window shatter. 5RP 272-73. Williams testified he saw a male press the backside of his body to an upstairs window before it broke. 5RP 308. Frightened by the noise, Anderson retreated to the east side of the residence. 5RP 275. Williams, also alarmed, retreated behind a car parked on the street. 5RP 275.

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[4] Another security guard, Theodore Jones, saw the speeding blue Honda and later saw two or men walking through the park near the car. 5RP 261-62.

From behind the car, Williams yelled for the occupants of the home to come out with their hands up. 5RP 310. Beltran peered out from behind the blinds of a front window and said, "If you try anything, I'll shoot you without hesitation." 5RP 314, 334. Williams was fearful because he could not see Beltran's hands or body, and at that point, there were multiple officers in the area. 5RP 314-15.

Officer Jeffrey Smith also responded to Beltran's house. Shortly after Smith arrived, Beltran stuck his head out a front window and screamed, "Fuck you . . . . Put your guns away." 4RP 232. After police yelled to the occupants to come out, Beltran again yelled "Fuck you. If you take one step on this porch, I'll fucking shoot you without hesitation." 4RP 233.

Shortly thereafter, two adult women and two or three children came out the front door. 4RP 233; 5RP 316. Beltran followed them onto the porch a few steps and appeared to wave goodbye. 5RP 279. Police again yelled at Beltran to come out with his hands up. 5RP 317. Instead, Beltran yelled at police officers to leave. 5RP 318.

As that point, Officer Anderson crept around the corner of the house and shot his Taser at Beltran. 4RP 234; 5RP 280. The probes struck Beltran's upper body, but he fled back into the house pursued by police. 4RP 234-35; 5RP 281-82, 321, 349.

According to Anderson, his Taser indicated that the weapon was fired four times in just over a minute. 5RP 282-85, 289, 296-98. The first two times, the probes appeared to have little effect. 5RP 282-83. The third time, Beltran fell on the stairs leading up to the second floor. 5RP 285. The fourth time, the Taser did not appear to work. Anderson believed that was because the wires attaching the weapon to Beltran's body had been broken in the scuffle. 5RP 289

Smith entered the residence behind three other officers. When he entered the house, Anderson and Williams were on the stairs trying to subdue Beltran. 4RP 237-38. Another police officer, Gerald Turney, entered the fray and was kicked down the stairs onto his back.[5] 4RP 238; 5RP 286-87, 296. In contrast to Smith's testimony, Williams said he saw Turney and Anderson struggling with Beltran on the stairs and then *Williams* entered the fray. 5RP 321-22. According to Williams, Beltran was attempting to pull his arms toward his body as if trying to reach for a weapon. Williams therefore struck Beltran in the head multiple times hoping to disorient him. 5RP 323-24, 326-27, 336.

Officer Williams eventually dragged Beltran down the stairs and onto the kitchen floor. 5RP 288. Beltran continued to struggle but was

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[5] The kick to Turney formed the basis of the third degree assault charge. 6RP 494-97. The jury acquitted Beltran of that charge. CP 56.

soon handcuffed. 4RP 239; 5RP 290, 326. According to Williams, the whole incident occurred very quickly. 5RP 325

After Beltran was subdued, Anderson removed Taser probes from Beltran's chest, bicep, hand, and forearm. 5RP 298. Beltran had a large "goose egg" on the side of his head and his face was swollen. 5RP 335. Another officer noted cuts to Beltran's face and hand. 5RP 375-76. In addition, Beltran smelled of alcohol and appeared to be intoxicated. 4RP 165-66.

No guns were found in the residence or on Beltran's person. 4RP 249; 5RP 295. Police encountered two other men in the house: James Abbott, 17, and Jason Kushman, 18. 5RP 331.

Beltran testified at trial and denied driving the Honda or threatening police. He was off work on July 26 and was drinking alcoholic beverages throughout the day. 6RP 391, 425. Abbott, the brother of Beltran's girlfriend, and Kushman, Abbott's cousin, were visiting Beltran's family that day. 6RP 391-92.

At some point, Beltran decided to retrieve his car, which was parked at his brother's residence on the other side of a green space. 6RP 395, 429. Abbott and Jason accompanied Beltran to get the car. 6RP 396. Beltran realized he was too drunk to drive so instead let Jason drive. 6RP 396, 434. Jason, an inexperienced driver, hit a stop sign. 6RP 436.

Beltran told Jason he was crazy and they needed to go home. 6RP 398, 436.

Back at his house, Beltran noticed police were surrounding his residence with their guns drawn. 6RP 399-400, 439. Suddenly, a window broke, frightening Beltran and the other occupants of the home. 6RP 400. Beltran found this especially alarming because his father had been shot by Tacoma police a few weeks earlier. 6RP 400, 427-28.

Beltran yelled to police that they needed to leave. 6RP 399, 401. He told them to put their guns away and "[y]ou are not going to shoot me like you shot my dad." 6RP 401, 405, 443.

After police ordered everyone out of the house, Beltran followed his girlfriend and their children out the door, but he was soon struck by Taser probes. 6RP 406. Beltran ran back inside, where he was tackled and punched by police. 6RP 408. After his arrest, Beltran had multiple wounds including puncture wounds from the Taser probes. 6RP 407, 410-12, 421-22.

3. Closing argument

In closing, the State walked the jury through each of the seven charges and pointed out which conduct during the relatively short time period supported each charge. 6RP 489-99.

Part of this overarching matching of events to charges, the prosecutor argued that Beltran was guilty of obstructing a law enforcement officer if he "willfully hindered, delayed or obstructed a law enforcement officer." 6RP 497-98. "From the moment the officers came to the door and were knocking, saying, 'Cesar Beltran, come out,' [and] he refused, he was . . . willfully and intentionally creating a hindrance or delay or obstruction of the officers in their official capacity." 6RP 498.

The prosecutor continued,

> When he fled from the officers, he caused delay in this whole thing. This whole thing could have taken moments if he had just come out. . . .
>
> . . . . Did [Beltran] know that they were discharging official duties as police officers? He knew the police were outside. That is why he was not coming out. He knew exactly who was outside. He knew why they were outside. He committed the crime of obstruction.

6RP 498.

Moving on from obstructing, the prosecutor then argued that Beltran resisted arrest when he attempted to prevent police from arresting by running into the house and attempting to flee up the stairs. 6RP 498-99.

C. ARGUMENT

1. FLAGRANT, PREJUDICIAL PROSECUTORIAL MISCONDUCT DENIED THE APPELLANT A FAIR TRIAL.

Due process requires that the State bear the burden of proving every element of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Cantu, 156 Wn.2d 819, 825, 132 P.3d 725 (2006). Prosecutors, like judges, are servants of the law. State v. Gorman, 219 Minn. 162, 175, 17 N.W.2d 42 (1944).

When a prosecutor commits misconduct, he may deny the accused the fair trial guaranteed by the state and federal constitutions. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005); see U.S. Const. amend. 14; Const. art. 1, § 3. A prosecutor's argument must be confined to the law. State v. Estill, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972); State v. Walker, 164 Wn. App. 724, 736, 265 P.3d 191 (2011). When the prosecutor mischaracterizes the law, and there is a substantial likelihood that the misstatement affected the jury verdict, the accused is denied a fair trial. State v. Gotcher, 52 Wn. App. 350, 355, 759 P.2d 1216 (1988). A prosecutor's misstatement of the law is a serious irregularity that may mislead the jury. State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984).

This Court reviews the State's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. Boehning, 127 Wn. App. at 519. Where a defendant fails to object to prosecutorial misconduct, reversal is required if the misconduct is so flagrant and ill intentioned that it results in prejudice incurable by a curative instruction. State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006). Courts should "'focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.'" State v. Lindsay, 180 Wn.2d 423, 431 n. 2, 326 P.3d 125 (2014) (quoting State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012)).

"A person is guilty of obstructing a law enforcement officer if [he] willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties." RCW 9A.76.020(1); CP 37 (to-convict instruction, listing elements as willful hindrance, delay, or obstruction of law enforcement officer, plus knowledge that officer was "discharging official duties at the time").

A person acts willfully when he acts knowingly with respect to the material elements of the offense. RCW 9A.08.010(4). "Hinder" means "to make slow or difficult the course or progress of." State v. Steen, 164

Wn. App. 789, 798, 265 P.3d 901 (2011) (citing Webster's Third New Intl'l Dictionary 1070 (2002)), review denied, 173 Wn.2d 1024 (2012). "Delay" means "to stop, detain, or hinder for a time . . . to cause to be slower or to occur more slowly than normal." Steen, 164 Wn. App. at 798 (citing Webster's at 595). "Obstruct" means "to be or come in the way of: hinder from passing, action, or operation." Steen, 164 Wn. App. at 798 (citing Webster's at 1559).

Here, the prosecutor argued Beltran was guilty of obstructing law enforcement as soon as police told him to come out of his house and he failed to do so. 6RP 498. The State elected that act the basis for the obstructing charge. 6RP 497-98.

But this argument misstated the law because Beltran was not required to come out of the house when the police officers first arrived. Consistent with former RCW 10.31.100 (2010), a police officer may make a warrantless arrest for certain misdemeanors committed outside the officer's presence, including those involving physical harm to property. Former RCW 10.31.100(1); see also RCW 10.31.100(3) (listing traffic crimes supporting such a warrantless arrest, including "duty on striking property"). But this statutory authorization only applies where the arrest occurs in a public place. To make a warrantless arrest in a home, there must be both probable cause and some exigency justifying the intrusion.

State v. Mierz, 72 Wn. App. 783, 792, 866 P.2d 65 (1994) (citing Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980); State v. Dresker, 39 Wn. App. 136, 692 P.2d 846 (1984)).

Courts use six factors to determine whether police entry into a home without a warrant is justified. They evaluate whether (1) the crime is a grave offense, and in particular, whether it is a crime of violence; (2) whether the suspect is reasonably believed to be armed; (3) whether there is trustworthy information that the suspect is guilty; (4) whether there is strong reason to believe that the suspect is on the premises; (5) whether the suspect is likely to escape if not swiftly apprehended; and finally, whether (6) entry can be made peaceably. State v. Terrovona, 105 Wn.2d 632, 644, 716 P.2d 295 (1986).

According to the State's evidence at trial, Beltran threatened to shoot police officers from his home. Arguably, an exigency arose at that point under the Terrovona factors. But before that, there was no exigency based on the suspected driving offenses that would have excused the police from obtaining a warrant. See State v. Hinshaw, 149 Wn. App. 747, 755, 205 P.3d 178 (2009) (no exigency in a DUI case where State failed to prove that a warrant was unobtainable in time to prevent destruction of the evidence, and noting that probable cause to suspect the commission of a serious offense alone is insufficient to establish

exigency). Here, when police knocked, they had reason to believe Beltran's car was involved, and one officer saw Beltran retreat into the house. On these facts, however, none of the factors support a warrantless entry.

The prosecutor therefore misstated the law in arguing Beltran was obstructing from the moment he failed to respond to police commands to come to the door. The police lacked authority to enter his house. Beltran was not acting contrary to any officer's "official powers or duties" because such powers did not include the right to arrest Beltran in his home or force him out of it without a warrant.

The prosecutor's argument was, therefore, a serious misstatement of the law. Davenport, 100 Wn.2d at 764. The argument was, moreover, reasonably likely to have affected the jury's verdict. Gotcher, 52 Wn. App. at 355. In a case that charged multiple crimes over a short period of time,[6] the argument instructed the jury as to the discrete act the State was relying on. But this act, as a matter of law, did not support the charge. Beltran has therefore shown prejudice.

Where defense counsel fails to object, prosecutorial misconduct is still reversible error when the misconduct is so flagrant and ill intentioned that it cannot be cured by an appropriate jury instruction. Walker, 164

[6] 5RP 296, 325.

Wn. App. at 737. Even if an instruction might have cured an isolated misstatement, for example, the cumulative effect of repeated prejudicial misconduct may require reversal. Id.

Although this Court's Walker case is not identical, it is instructive. The prosecutor in Walker made arguments that minimized the burden of proof beyond a reasonable doubt and misled the jury regarding Walker's defense. 164 Wn. App. at 731-32, 735. This Court reversed despite the lack of objection below. Id. at 739. First, the court explained, the physical evidence left room for reasonable doubt and the case essentially came down to credibility. Id. at 738. Thus, the nature of the evidence created a situation in which "the prosecutor's improper arguments could easily serve as the deciding factor." Id. Additionally, the improper argument was not limited to one or two isolated comments. Id. On the contrary, the prosecutor used the improper comments, "to develop themes throughout closing argument." Id.

This Court's concerns in Walker are also present in this case. Most significantly, the prosecutor's misstatement of the law of was the predominant theme in closing argument as to the charge. 6RP 489-99. As in Walker, reversal is required.

2. BELTRAN'S ATTORNEY WAS INEFFECTIVE WHEN HE FAILED TO OBJECT TO A MISTATEMENT OF THE LAW THAT LED TO CONVICTION ON IMPROPER GROUNDS.

If this Court concludes the prosecutorial misconduct claim was not preserved, Beltran was denied the right to effective assistance when his attorney failed to object to the prosecutor's misstatement of the law.

The federal and state constitutions guarantee an accused the right to effective representation. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987) (citing U.S. Const. amend. 6; Const. art. 1, § 22). Ineffective assistance of counsel is a constitutional error that may be considered for the first time on appeal. State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). If a prosecutor's remark is improper and prejudicial, failure to object may amount to deficient performance. In re Cross, ___ Wn.2d ___, 327 P.3d 660, 693 (2014).

The two-part test set forth in Strickland is used to determine whether an accused has received ineffective assistance. Thomas, 109 Wn.2d at 225-26. As for the first prong, this Court must determine if counsel's performance was deficient. Id. Defense counsel's representation is deficient if it falls below an objective standard of reasonableness based on consideration of all the circumstances. State v.

Maurice, 79 Wn. App. 544, 551-52, 903 P.2d 514 (1995). Under the second prong, this Court must reverse if it finds a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Thomas, 109 Wn.2d at 226 (citing Strickland, 466 U.S. at 694).

A claim of ineffective assistance of counsel presents a mixed question of fact and law that is reviewed de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

Here, counsel's performance was unreasonably deficient because he failed to object to the State's closing argument, which misled the jury as to Beltran's duty to respond to police commands to leave his house. As discussed in the preceding argument section, this argument likely affected the jury's verdict.

If this Court finds the error could have been cured by instruction to the jury, however, counsel was ineffective in failing to request such an instruction. A proper instruction would have to ensured that Beltran was not convicted based on refusing to leave his home at a time when the police had did not yet have the authority to arrest him in his home. Cf. State v. Ermert, 94 Wn.2d 839, 850, 621 P.2d 121 (1980) (by failing to object to jury instruction misstating elements of the crime, trial counsel

allowed Ermert to be convicted of a crime she could not have committed under the facts presented by the State).

Prejudice from deficient performance occurs when there is a reasonable probability that, but for counsel's deficient performance, the outcome of the trial would have been different. Thomas, 109 Wn.2d at 226. Put another way, prejudice requires reversal whenever the attorney's error undermines confidence in the outcome. Id. Here, counsel's failure to object permitted the State to argue the jury should convict Beltran of obstructing for acts that did not constitute the crime. For the reasons stated above, it is likely that the prosecutor's misstatement of the law affected the verdict, and therefore Beltran satisfies the prejudice prong. See Wiggins v. Smith, 539 U.S. 510, 537, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (test for "reasonable probability" of prejudice is whether it is reasonably probable that, without the error, at least one juror would have reached a different result). Because Beltran received ineffective assistance as to the obstructing conviction, that conviction should be reversed.

3. THE ACTS "ELECTED" BY THE STATE ARE INSUFFICIENT TO SUPPORT THE OBSTRUCTING CHARGE.

Due process requires the State to prove beyond a reasonable doubt all the necessary facts of the crime charged. U.S. Const. Amend. 14; State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). Evidence is

sufficient to support a conviction only if, when viewed in the light most favorable to the State, a rational trier of fact could find each element of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Davis, 176 Wn. App. 849, 861, 315 P.3d 1105 (2013), review granted on other grounds, 179 Wn.2d 1014 (2014).

Here, based on the acts the State elected to support the charge, there was insufficient evidence to support a conviction for obstructing. Common sense indicates the same acts may, in some circumstances, support both a resisting and an obstructing conviction.[7] But the prosecutor drew a temporal line between the acts supporting the charges of obstructing law enforcement officers and resisting lawful arrest. 6RP 498. The prosecutor argued Beltran (1) obstructed police when police knocked on the door but he refused to come out and then (2) resisted arrest when he attempted to prevent police from arresting him by running into the house and attempting to flee up the stairs. 6RP 498. As set forth in the first argument section of this brief, however, the prosecutor's theory of obstruction was not supported by the law or the facts: Police officers were

[7]A person is guilty of resisting arrest if he "intentionally prevents or attempts to prevent a peace officer from lawfully arresting him." RCW 9A.76.040. A person acts intentionally if he "acts with the objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010(1)(a).

not permitted to enter the house to arrest him absent exigent circumstances, which were not present in this case.

In summary, Beltran engaged in variety of acts that could arguably support an obstructing conviction. As Washington courts permit, the State carefully elected the act it was relying on for the obstructing charge. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984); see State v. Bland, 71 Wn. App. 345, 352, 860 P.2d 1046 (1993) (closing argument identifying a particular act for each count supported conclusion that the State made an election).

But the act chosen by the State did not, as a matter of law, support an obstructing conviction. Insufficient evidence therefore supports Beltran's conviction. Davis, 176 Wn. App. at 861; see also State v. Aho, 137 Wn.2d 736, 744, 975 P.2d 512 (1999) (finding due process violation where accused may have been convicted based on acts occurring before the effective date of the statute and jury verdict did not identify when the acts found to constitute the offense occurred). The conviction should be reversed and dismissed with prejudice. Davis, 176 Wn. App. at 870.

4. THE TRIAL COURT VIOLATED THE APPELLANT'S RIGHT TO A PUBLIC TRIAL BY HAVING THE ATTORNEYS EXERCISE PEREMPTORY CHALLENGES PRIVATELY.[8]

At Beltran's trial, the judge conducted a portion of voir dire in private, by having the attorneys quietly pass a sheet of paper back and forth to exercise peremptory challenges, while requiring the parties to exercise for-cause challenges in public. 3RP 25. The trial ordered the parties to engage in this practice without considering or even articulating the Bone-Club[9] factors. The court did not contemporaneously announce which party dismissed each juror. Instead, the court filed a document containing this information after the fact that listed only the jurors names. CP 103.

An accused person has a constitutional right to a speedy and public trial. U.S. Const. amend. VI; Const. art. 1, § 22. In addition, article I, section 10 of the state constitution expressly guarantees to the public and press the right to open court proceedings. State v. Easterling, 157 Wn.2d

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[8] Beltran acknowledges this Court found to the contrary in State v. Dunn, __ Wn. App. ___, 321 P.3d 1283, 1285 (2014), which relies on the opinion of Division Three in State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013). A petition for review was filed in Love under case no. 89619-4. A petition for review was filed in Dunn under case no. 90238-1. The Supreme Court has stayed consideration of both petitions pending a decision in State v. Smith, case no. 85809-8.

[9] State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

167, 174, 137 P.3d 825 (2006). The First Amendment implicitly protects the same right. Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

The right to a public trial is the right to have a trial open to the public. In re Pers. Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004). This is a core safeguard in our system of justice. State v. Wise, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012). The open and public judicial process helps assure fair trials, deters perjury and other misconduct by participants, and tempers biases and undue partiality. Id. at 6. It is a check on the judicial system, provides for accountability and transparency, and assures that whatever transpires in court will not be secret or unscrutinized. Id. The public trial requirement also benefits the accused in that it ensures "that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995) (quoting In re Oliver, 333 U.S. 257, 270 n. 25, 68 S. Ct. 499, 92 L. Ed. 682 (1948)).

The right to a public trial encompasses jury selection. Presley v. Georgia, 558 U.S. 209, 723-24, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); Wise, 176 Wn.2d at 11. Before a trial judge can close any part of jury

selection, it must analyze the five factors identified in State v. Bone-Club.[10] Orange, 152 Wn.2d at 806-07, 809; see also State v. Brightman, 155 Wn.2d 506, 515-16, 122 P.3d 150 (2005) (a trial court violates a defendant's right to a public trial if the court orders the courtroom closed during jury selection but fails to engage in the Bone-Club analysis).

A violation of the public trial right is structural error, is presumed prejudicial, and is not subject to harmless error analysis. Id. at 13-15; State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009). The error can be raised for the first time on appeal. Wise, 176 Wn.2d at 13 n.6.

"For-cause" and peremptory challenges constitute a portion of "voir dire," to which public trial rights attach. State v. Wilson, 174 Wn. App. 328, 342-43, 298 P.3d 148 (2013); see also People v. Harris, 10 Cal. App. 4th 672, 681-682, 684, 12 Cal. Rptr. 2d 758 (1992) ("The peremptory challenge process, precisely because it is an integral part of

[10] Under the Bone-Club test, (1) the proponent of closure must show a compelling interest for closure and, when closure is based on a right other than an accused's right to a fair trial, a serious and imminent threat to that compelling interest; (2) anyone present when the closure motion is made must be given an opportunity to object to the closure; (3) the proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests; (4) the court must weigh the competing interests of the proponent of closure and the public; and (5) the order must be no broader in its application or duration than necessary to serve its purpose. Bone-Club, 128 Wn.2d at 258-60; Wise, 176 Wn.2d at 12.

the voir dire/jury impanelment process, is a part of the 'trial' to which a criminal defendant's constitutional right to a public trial extends"; peremptory challenges made in chambers on paper violated public trial right even where proceedings were reported and results announced publicly), review denied, (Feb. 02, 1993).

To dismiss jurors during courtroom sidebars and by passing a sheet of paper back and forth is to hold a portion of jury selection outside the public's view. State v. Slert, 169 Wn. App. 766, 774 n.11, 282 P.3d 101 (2012), review granted in part, 176 Wn.2d 1031 (2013). Moreover, physical closure of the courtroom is not the only situation that violates the public trial right. For example, a closure also occurs when a juror is privately questioned in an inaccessible location. State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011) (citing Momah, 167 Wn.2d at 146; Strode, 167 Wn.2d at 224); see also State v. Leyerle, 158 Wn. App. 474, 483, 242 P.3d 921 (2010) (moving questioning of juror to public hallway outside courtroom a closure despite the fact courtroom remained open to public). Thus, whether a closure – and hence a violation of the right to public trial – has occurred does not turn strictly on whether the courtroom has been physically closed. See, e.g., State v. Love, 176 Wn. App. 911, 915-16, 309 P.3d 1209 (2013) (rejecting state's "bright line rule" that for-cause challenges conducted at sidebar in open court did not constitute a

courtroom closure). Members of the public are no more able to approach the bench and listen to an intentionally private voir dire process then they are able to enter a locked courtroom, access the judge's chambers, or participate in a private hearing in a hallway. And the practical impact is the same. The public is denied the opportunity to scrutinize events.

As Beltran acknowledges, this Court recently rejected a similar argument regarding the exercise of peremptory challenges in State v. Dunn, __ Wn. App. ___, 321 P.3d 1283, 1285 (2014). That decision primarily relied on Division Three's decision in Love, 176 Wn. App. 911. There, the court applied the "experience and logic" test adopted in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012), and concluded the public trial right does not attach to for-cause and peremptory challenges. Love, 176 Wn. App. at 918.

Contrary to the holding of Love, it is well established that the right to a public trial extends to voir dire. "For-cause" and peremptory challenges are and have been an integral part of this process. Strode, 167 Wn.2d at 230 (for-cause challenges of six jurors in chambers was not de minimis violation of public trial right); Wilson, 174 Wn. App. at 342 (unlike potential juror excusals governed by CrR 6.3, exercise of for-cause and peremptory challenges, governed by CrR 6.4, constitutes part of "voir dire," to which the public trial right attaches).

In support for its contrary conclusion regarding the "experience" prong, the Love court noted the absence of evidence that, historically, for-cause and peremptory challenges were made in open court. Love, 176 Wn. App. at 918. But history would not necessarily reveal common practice unless the parties made an issue of the employed practice. History does not tell us these challenges were commonly done in private, either. Moreover, before Bone-Club, there were likely many common, but unconstitutional, practices that ceased with the issuance of that decision.

The Love court, however, cites to one case, State v. Thomas, 16 Wn. App. 1, 553 P.2d 1357 (1976), as "strong evidence that peremptory challenges can be conducted in private." Love, 176 Wn. App. at 918. Thomas rejected the argument that "Kitsap County's use of secret – written – peremptory jury challenges" violated the defendant's right to a fair and public trial where the defendant had failed to cite to any supporting authority. Thomas, 16 Wn. App. at 13. Notably, Thomas predates Bone-Club by nearly 20 years. Moreover, the fact that Thomas challenged the practice suggests it was atypical even at the time. Labeling Thomas "strong evidence" is an overstatement.

Regarding the "logic" prong, the Love court could think of no way in which exercising peremptory challenges in public furthered the right to fair trial, concluding instead that a written record of the challenges

sufficed. Love, 176 Wn. App. at 919. The court failed, however, to mention or consider the increased risk of discrimination against protected classes of jurors resulting from non-disclosure. And after-the-fact disclosure is no substitute. Whether members of the public could discern, after the fact, which prospective jurors had been removed by whom (assuming they knew to look in the court file), the public could not tell at the time which party had removed any particular juror, making it impossible to determine whether a particular side had improperly targeted any protected group based, for example, on gender or race.[11] See State v. Burch, 65 Wn. App. 828, 833-34, 830 P.2d 357 (1992) (identifying both as protected classes); see also State v. Saintcalle, 178 Wn.2d 34, 309 P.3d 326 (2013) (lead opinion, concurrence, and dissent underscore harm resulting from improper race-based exercises of peremptory challenges and difficulty of prevention).

In summary, there is no indication the trial court considered the Bone-Club factors before conducting the private procedure that led to dismissal of a number of jurors during voir dire. CP 103. By employing this procedure, the court violated Beltran's right to public trial. Wise, 176

[11] This would have also required members of the public to recall the specific features of six different individuals. CP 103.

Wn.2d at 13. This Court should therefore reverse each of Beltran's convictions.

D. CONCLUSION

This Court should reconsider its holding in Dunn and hold that the private exercise of peremptory challenges violated Beltran's right to a public trial. This Court should, therefore, reverse all charges and remand for an open and public trial.

In any event, this Court should reverse Beltran's obstructing conviction based on prosecutorial misconduct, ineffective assistance of counsel, and because, in light of the State's "election" in closing argument, insufficient evidence supports the conviction.

DATED this 8TH day of August, 2014.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 45893-4-II
	)	
CESAR BELTRAN,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 8TH DAY OF AUGUST, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CESAR BELTRAN
NO. 2014016031
PIERCE COUNTY JAIL
910 TACOMA AVENUE S
TACOMA, WA 98402

SIGNED IN SEATTLE WASHINGTON, THIS 8TH DAY OF AUGUST, 2014.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

August 08, 2014 - 3:00 PM

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